The broad scope of the EBR exemption is not accidental. Congress realized that a business relationship may arise because a consumer has purchased a particular product from a multi-product firm. and that neither the marketer nor its customer should be artificially cut off from other products offered by the same company which may – or may not – be "related" to the original purchase. Congress also recognized that some consumers might not want to receive calls regarding products "unrelated" to the transaction that gave rise to the EBR. The solution was to put control in the hand of the consumer: The consumer can always instruct the merchant to place his or her name on the merchant's DNC list, despite the existence of the business relationship. As the Commission and courts have recognized,[17] in the context of a company-specific list, this request effectively terminates the EBR, the EBR exemption (although not the underlying business relationship or contract) for purposes of future calls, regardless of whether the subsequent call involves a product that is "related" to the original transaction.

The existing opt-out arrangement moots a further difficulty with the attempt to narrow the EBR definition: How is the term "related" to be defined? Is offering fishing gear to a consumer who purchased a sleeping bag "related" or not? Is offering a DVD to a club member who purchased a book upon which the DVD is based a "related" transaction? Most importantly. is there to be a different "relatedness" test for telephone companies subject to the Commission's CPNI rules than there is for other businesses subject only to the TCPA? If so. how is that difference to be justified? The short answer is that any attempt to narrow the scope of the EBR by reference to the content of a call. or the type of product or service involved is. if not unlawful, certainly had policy

[17] *See, e.g., Charvat v. Dispatch Consumer Serv., Inc.*, 76 N.E.2d 829 (Ohio 2002).

The Commission also questions whether or not there should be a temporal limit on EBR. A temporal limit will needlessly complicate a clear rule. As an initial matter, we note once again that if Congress had intended to limit the duration of an EBR, it would have provided the Commission with a statutory basis to do so. A temporal limit on the duration of an EBR is not simply a time, place, and manner restriction on speech. It would interfere with contract and business relationships between marketers and their *existing* customers

Moreover. there is no reasonable means to establish a "clock" – to determine when the relationship begins and ends – that will apply across all the industries that use the phone to relate to their customers. Different business models require different periods of time. For example, a lawn care company may only call customers at the start of the growing season. A magazine company may contact a customer at the end of multi-year subscription. A clothing company may call at the start of a sale. Thus, the time that companies and consumers consider to bc a useful EBR may range from a few weeks to a few years. The variation is so great that any attempt by regulators to establish uniform temporal limits is invariably subjective and arbitrary.

In states that have tried to create narrow temporal limits on EBR, the regulations have become complicated, difficult to administer, and virtually impossible to enforce. They also reflect considerable differences.[18] The Commission should maintain regulations that are simple for businesses and consumers to follow, that are enforceable, that provide clear guidance. and that promote reasonable business opportunities.

[18] *See. e.g.*, Arkansas – 36 months (Act 1465 § 3(e)); California – pending proposal of 1 year lor seasonal goods, 30 days tor non-seasonal goods, plus other limits for various other goods and services; Colorado – 18 months (Colo. Rev. Srat. § 6-1-903(7)); Kansas – 6 months (Kan. Stat. Ann. § 50-670); Missouri – 180 days (Mo. Rev. Srat. § 407.1095); Oklahoma – 24 months (Okla. Stat. 15 § 775B.2.3); Tennessee – 12 months (Tenn. Code Ann. § 65-4-401).

Furthermore, one definition of EBR should apply throughout the regulations. Forcing marketers to utilize multiple definitions of EBR will needlessly complicate administration and compliance efforts, triggering fresh consumer complaints. There is no evidence that the existing definition does not work; it should bc retained.

## C. THE COMMISSION MUST EXERCISE ITS EXCLUSIVE JURISDICTION OVER THE USE OF PREDICTIVE DIALERS

This Commission is the only regulatory agency authorized and empowered to regulate predictive dialers. If the Commission determines that the record in this proceeding demonstrates a need for regulatory limits on predictive dialers, The DMA believes that a cap of 5% of answered calls per day is a reasonable limit on abandoned calls. At all events, there is no valid reason to set a rate lower than ***3%*** within a 30-day period. Most importantly, the Commission should clarify that its standards – including a decision ***not*** to impose new rules. if that is the case – preempt any other regulations that purport to govern the use of predictive dialers used to place interstate calls.

### 1. The FCC Has Sole Authority to Regulate Predictive Dialers as Customer Premises Equipment (CPE)

The Commission asks whether predictive dialers are "automated telephone dialing systems" within the meaning of the TCPA. There is no global answer to this question. The statutory definition turns on whether the device is "capable" of generating numbers for random or sequential dialing. There are a number of different types of dialers in the market; a number of companies – including many of the largest telemarketers and service bureaus – use proprietary systems. Some dialers are capable of being programmed for sequential or random dialing; some arc not. Fundamentally, however, whether or nor

predictive dialers are technically covered by the definition of "autodialer" in the TCPA, they are plainly CPE and, therefore, within the FCC's exclusive jurisdiction.

The Communications Act of 1934, as amended ("Communications Act" or "Act"), gives this Commission plenary jurisdiction to "regulat[e] interstate and foreign . . communications by wire and radio."[19] The FCC also has jurisdiction over facilities that are incidental to the transmission of interstate wire communications.[20] The Act, however, also provides that, with certain exceptions – notably including implementation of the TCPA – it shall not "be construed to apply or to give the Cornmission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[21] Thus, Congress granted the Commission exclusive jurisdiction over "interstate communications"[22] while generally preserving jurisdiction over "intrastate communications" for the states. When, however, communications facilities are jointly used for both inter- and intrastate communications, the Commission may and has preempted state regulation of intrastate activities to promote and protect the achievement of federal policies.

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19 47 U.S.C. § **151.** *See also id.* § 152(a)

20 *Id.* § 153(52). The Communications Act defines "wire communication" as "the transmission of writing, signs. signals, pictures. and sounds of all kinds by aid of wire, cable. or other **like** connection between the points of origin and ieception of such transmission. including all instrumentalities, facilities. apparatus, and services . . . incidental io such transmission."

21 *Id* § 152(b)

22 The Communications Act defines an "intersrate communication" to include communications or transmissions from any Srare or U.S. possession or territory to any other State. possession, **or** territory. *Id.* § 153(22)

In particular, the Commission long ago preempted state efforts to regulate customer premises equipment, or "CPE," that are inconsistent with FCC standards.[23] CPE is defined as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[24] Whether or not the Commission finds that they are a form of "autodialer" under the TCPA, predictive dialers are plainly CPE: They are located at a marketer's (or its teleservices vendor's) business location and they are designed and manufactured for the specific purposes of originating, routing, and terminating telecommunications. Thus, states (such as California) seeking to substantively regulate the operation of predictive dialers do so in conflict with the Commission's longstanding policy of preempting state regulation of CPE

The need for a single, national standard governing the operation of predictive dialers is compelling, This form of CPE is used jointly for inter- and intrastate communications and it is not feasible to separate them physically or as a regulatory matter. State regulation would effectively negate federal policy.[25]

Like other forms of CPE, predictive dialers support both inter- and intra-state communications and are used "inseparably and interchangeably" for both types of calling. Predictive dialers are, for instance, routinely used to call past customers who are scattered throughout the country to offer a new or enhanced product or service, including

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23 *See* Amendment of Section 64 702 of the Commission's Rules (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980). *recon.*, 84 F.C.C.2d 512, *further recon.*, 88 F.C.C.2d 384 (1981), *aff'd sub nom.*, *Computer & Comm Indus Assoc. v. FCC*, 693 F.2d 198 (D.C.Cir. 1982), *cert denied*, 461 U.S. 938 (1983)("*CCIA*").

24 47 U.S C. § 153(14).

25 *See, e.g. Texas Public Util Comm'n v. FCC*. 880 F.2d 1325 (D.C. Cir. 1989) (upholding FCC preemption of state regulation of connection of private microwave system to the PSTN); *Illinois Bell Tel. Co. v. FCC*. 883 F.2d 104 (D.C. Cir. 1989) (upholding FCC preemption of state regulations relating to Centrex service); *North Carolina Util Comm'n v FCC*. 552 F.2d 1036 (4th Cir. 1977)("*NCUC II*"), *cert denied*, 434 U.S. 874 (1977) (same - customer-supplied telephones).

customers in the same state(s) where a marketer maintains its call center(s). A call to California might be followed by calls to New York, then to Ohio, to Arkansas, more to California, and so on. It would be unreasonably burdensome to require telephone marketers to maintain separate predictive dialing systems in order to "separate" inter- and intrastate calling capabilities. And such a policy would be particularly onerous – and expensive and unfair – for companies that maintain call centers in multiple states.

If, for instance, the FCC adopts a 5% cap on call abandonment, a marketer engaged in interstate marketing could not reasonably use one predictive dialing system to place calls into states that choose to adopt a lower rate, or to include a different time period or type(s) of calls to determine its actual abandonment rate. The only option would be *to* reprogram the system every single time it is going to place a call to a different state. That is simply unworkable in an interstate marketing context. Marketers would, in effect, be forced to divide every single marketing campaign virtually on a call-by-call basis. It would also render such systems useless, since any efficiency gains they offer would be lost, not least because of the need to make constant changes to the system. Furthermore, a marketer could not use the system *at all* in a state that purports to set an abandonment rate at zero, which nor even manual dialing can achieve. Therefore, if the Commission decides to limit abandoned calls tied to predictive dialing, it must ensure that marketers can depend on uniform nationwide standards and, in particular, a predictable, consistent limit on call abandonment. The Commission must preempt any law or regulation that would establish a lower rate than the Commission adopts. Nothing would so negate a federal policy as a state requirement that purports to prohibit what federal standards expressly permit.

It is also impossible to segregate the interstate components of a regulatory scheme for predictive dialers. It is not feasible to separate interstate and intrastate calls for purposes of applying different rules to each, or for purposes of assessing or enforcing compliance with a myriad of inconsistent and potentially conflicting computational rules. Marketers can not, for instance, artificially "allocate" some portion of the operation of a predictive dialing system to intrastate calls while reserving some other part of it for interstate calls to determine whether or not they have satisfied an abandonment rate limit. There is simply no way to tease out rules that would apply only to interstate calls from those that could apply only to in-state calls. Thus, if states are permitted to impose different standards for predictive dialers, marketers would face a host of varying standards – which could even change within a single state depending on the type of product or service offered, who or when a marketer calls, or other factors – with which it would surely be impossible to comply without maintaining a separate system for every statc. and perhaps for every calling campaign. **As** the Court explained in *CCIA*, "when statc regulation of intrastate equipment or facilities would interfere with the achievement of a federal regulatory goal. the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[26] The Commission must, therefore, make clear that any standards it adopts governing predictive dialers preempt different state requirements.[27]

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[26] *CCIA*, 693 F.2d at 214

[27] Although these comments focus most heavily on the difficulties posed by the prospect of multiple state rrandards. The DMA also notes that the FCC's exclusive jurisdiction over interstate communications and ancillary facilities pursuanr to the Communications Act also precludes other federal agencies from regulannq predictive dialers absent a specific grant of authority from Congress.

### 2. The TCPA Permits the FCC to Preempt State Regulation of Predictive Dialers

The TCPA specifically addresses the interplay between state and federal regulation of telemarketing practices and it permits this Commission to preempt statc rules governing predictive dialers. In fact, it effectively compels the Commission to preempt other standards purporting to govern the operation of this CPE technology.

First, the TCPA allows the Commission to regulate intrastate calls: It establishes standards that apply not only to interstate but also to intrastate telephone solicitations.[28] When Congress amended the Communications Act to incorporate the TCPA, it amended section 2(b) of the Act to exclude the TCPA from the section 2(b) limitations on FCC authority to regulate intrastate activity. Specifically, section 2(b) states that "*[e]xcept* as provided in sections 223 *through* 227 [the TCPA] of this title" the Act may not be construed to give the FCC jurisdiction over intrastate communications.[29] Thus, Congress cawed out an exception for the TCPA so that, notwithstanding the section 2(b) limitations that apply in other contexts, the TCPA expressly permits the Commission to adopt standards that govern intrastate activity

Second, the TCPA expressly provides for the establishment of **uniform** technical operations for all autodialers. It provides that, "except for the standards" that the FCC

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28 *See, e.g., Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000)

29 47 U.S.C. § 152(b)(emphasis added). The TCPA also directed the FCC to consider, in assessing the viability of a national DNC databasc. whether or not different standards should apply to "local" calls. giving further indication that Congress was empowering the FCC to regulate them. *Id.* at § 227(c)(1)(C). *See also* 137 Cong. Rec. E793 (daily ed. **Mal.** 6, 1991) (statement of Rep. Markey) ("The legislation. which *covers both intrastate and interstate unsolicited calls*, will establish Federal guidelines that will fill the regulatory gap due to differences in Federal and State telemarketing regulations. This will *give advertisers a single sei of ground rules* and prevent them from falling through the cracks between Federal and Srate statures.") (emphasis added).

adopts to govern the technical and procedural aspects of prerecorded messages, as well as separate provisions relating to a national database, the federal statute does not preempt certain state standards." Since the TCPA provides that state laws are not preempted "except" as to. *inter alia*, technical and procedural requirements, it follows that state laws *arc* wholly preempted to the extent that they seek to govern such matters. Thus, the TCPA affirmatively and explicitly preempts state standards that seek *to* regulate equipment that is governed by the Commission's technical and procedural rules, which plainly includes automatic dialing systems – with or without predictive dialing capabilities.'!

It would have been irrational for Congress to conclude that nationwide technical and procedural standards are necessary for equipment that generates pre-recorded messages, but that different and inconsistent technical and procedural rules could apply when the same equipment is used to route live operator calls, which Congress regarded as far less problematic. Congress did not act irrationally. It amended section 2(b) of the Act to refer to the TCPA to enable the Commission to adopt uniform technical and procedural standards for CPE regardless of whether it is used for pre-recorded calls or with live operators. The establishment of a call abandonment rate (including regulation of answering machine detection) is no less a technical or procedural standard than the "automatic release" requirement applicable to pre-recorded calls. Both are, therefore, subject to the Commission's exclusive jurisdiction.

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30 47 U.S.C.§§ 227(d), (e)(1)

31 *Id* § 227(d)(1)(A) (prohibiting use of autodialers in a manner that does not comply with FCC technical standards) and § 227(d)(3) (requiring FCC to promulgate technical and procedural standards).

Third, the TCPA's "savings" provision does not alter the Commission's overarching and exclusive jurisdiction over interstate communications and CPE, including predictive dialers. The savings language in the TCPA does preserve states' jurisdiction over some intrastate telemarketing activity by providing that neither the TCPA nor the Commission's implementing regulations

> shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits - **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded message systems; or (D) the making of telephone solicitations.'

Yet, when it enacted the TCPA, Congress was certainly well aware of the federal-state jurisdictional division it established - and maintains - in the Communications Act and the limits of states' powers. The TCPA did not override or in any way disturb the Commission's longstanding policy of preempting state regulation of CPE.

The fact that the TCPA grants state officials enforcement rights, as well as the TCPA's legislative history, further underscore Congressional sensitivity to states' lack of jurisdiction over interstate telemarketing activity; it is one of the key reasons Congress enacted the TCPA.[33] Similarly, Commission staff has previously explained that states have virtually no power to regulate interstate telemarketing. In 1998, the Chief of the Network Services Division of the FCC's Common Carrier Bureau wrote to a member of the Maryland House of Delegates, in response to his request for clarification, and

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[32] *Id.* § 227(e)(1) (emphasis added)

[33] *See* Sen. Rep. No. 102-178 at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 ("over 40 states have enacted legislation limiting the use of [prerecorded message devices] or otherwise restricting unsolicited relemarkeiing. The measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation . . . to supplement their restrictions on intrastate calls."); *id.* at 5, *reprinted in* 1991 U.S.C.C.A.N. at 1973 ("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who use these machines to place inrersrare telephone calls.").

concluded that the Communications Act "precludes Maryland from regulating or restricting interstate commercial telemarketing calls."[34]

At the same time, Congress departed from the longstanding policy of preserving to the states control over intrastate communications matters and, as we have pointed out, expressly amended Section 2(b) of the Communications Act to enable the Commission to establish a single national standard for both intrastate and interstate calls as to those matters where a national standard is, as a technological and policy matter, imperative.

Thus, there simply is no conflict between section 2(b) of the Communications Act as amended by the TCPA and the savings language subsection (e)(1) of the TCPA. The TCPA's savings language does not trump the Commission's plenary jurisdiction over CPE used for inter- and intrastate communications. States lack authority to establish standards for abandonment rates involving predictive dialers that are inconsistent with standards established by the FCC. The language and legislative history of the TCPA denionstrate that, to the extent that states retain jurisdiction over the use of predictive dialers under subsection (e)(1) of the TCPA, their jurisdiction is confined to regulating such matters as calling hours and disclosure requirements applicable to intrastate calls that are placed through the use of such customer premises equipment.[35] By contrast, under section 2(b) of the Communications Act, the Commission has exclusive jurisdiction over the operating standards – such as abandonment rates – that govern the use of the equipment for both inter- and intrastate calls.

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[34] Letter from Geraldine A. Matise, Chief. Network Services Division, Common Carrier Bureau, Federal Communications Cornmission. to Delegate Ronald A. Guns, House of Delegates (January 26, 1998).

[35] *See Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 11963).

### 3. The Commission Should Adopt a *Reasonable* Limit on Predictive Dialer Abandoned Calls

Predictive dialers enable a marketer to place more calls more efficiently by "predicting" when telephone sales representatives ("TSRs"') will be available to speak to a consumer and then placing calls at that rate. Thus, a predictive dialer is a dialing system that can use something greater than a 1:1 ratio ofoutbound telephone lines to the number of TSRs. The system is "intelligent," and makes decisions about when to dial based on a myriad of factors such as average call length, percentage of pick-ups, time of day, available agents, and available system resources in an attempt to minimize average TSR wait time while limiting the percentage of calls that are "abandoned." Predictive dialing helps enable TSRs to spend more time speaking with consumers who are interested in an offer than wailing for a connection or manually dialing calls. But it is not an exact science and sometimes a TSR will not be available to handle a call; when a TSR can not take **a** call the machine disconnects, which has become known as an "abandoned" call.

The DMA recognizes that despite the tremendous efficiencies of predictive dialing systems – which ultimately benefit consumers in the form of lower prices, fewer misdials, and improved quality controls – overly aggressive or careless use of this technology can annoy and frustrate consumers who too often get disconnected or find no one on the line when they answer a phone call. Too many abandoned calls also hurt conscientious telemarkerers by eroding consumer confidence and goodwill.

As we have noted. The DMA *Guidelines for Ethical Business Practices* set high standards for ethical business practices; Article #41 of the guidelines governs the use of

predictive dialers.[36] After careful study and consideration, The DMA established a standard requiring members to maintain a call abandonment rate that is "as close to 0% as possible, and in no case should exceed 5% of answered calls per day in any campaign." Telemarketers also should not "abandon the same telephone number more than twice within a 48-hour time period and not more than twice within a 30-day period of a marketing campaign." This is a reasonable threshold that balances consumer concerns with marketers' need for the efficiencies of predictive dialing technology.

When we adopted the guides, The DMA pledged to continue to examine these limits, and we continue to do so. Experience to date makes clear that a cap of less than 3% within a 30-day period is not realistic. It is not feasible to maintain abandonment rates of less than 3% and make meaningful use of the efficiency gains that the technology offers. Thus, while The DMA could support a reasonable limit on abandoned calls, the Commission must ensure that such a cap does not fall below 3% of answered calls within a 30-day period.

At the same time. the Commission must emphatically reject the suggestion advanced in the FTC proceeding that all abandoned calls be treated as a violation of the disclosure rules. Among other things, a call may be disconnected because the consumer hangs up within the permitted lag interval and the disclosures cannot be made in any meaningful way. Moreover, the practical effect of treating "dead air" (discussed below) and abandoned calls as violating the disclosure rules is to establish a zero abandonment rate. As The DMA's guidelines recognize, such a level is an appropriate **and** laudable

[36] A complete set of the *Guidelines for Ethical Business Practices* is attached as **Exhibit 1**

business goal. It is not, however, a practical objective given the current state of technology, and it can not and should not be established as a legal standard.

The Commission will need to spell out with precision what constitutes an "abandoned call" for purposes of its abandonment rate standard and how the abandoned call rate would be calculated. One type of abandoned call can occur when no customer representative is available to handle a call placed by a predictive dialer. A similar – but different – issue arises with the use of answering machine detection ("AMD"). AMD allows marketers to detect whether a live person or an answering machine has answered the call and to abandon the call if the intended recipient does not pick up the phone in person. Although the technology varies, it unquestionably creates the potential for an increase in "dead air." Dead air, however, is not the same thing as an abandoned call. Moreover, as the AMD technology is perfected, the duration of dead air resulting from the use of AMD is likely to decline. The use of AMD can serve a legitimate business purpose while creating a minimal inconvenience or annoyance to consumers.

Nonetheless, the Commission may be concerned about the use of AMD to abandon calls that are picked up by the consumer. This practice, which is of relatively recent origin, seems principally to involve marketers who wish only to leave a pre-recorded message with the consumer's answering machine or voice mail and, therefore, either abandon the call outright or (misleadingly) generate a "sorry wrong number" response if the call is answered by a live person. It is unclear why the few marketers using this practice believe it satisfies the spirit of the TCPA. Whatever the reason, the practice leads to a virtually 100 percent abandonment rate on answered calls.

The use of AMD for other purposes is more complex. Nonetheless, The DMA recognizes that there are consumers who find the dead air phenomenon offensive. There

is an alternative to an outright ban on AMD that should be equally effective. First, with caller ID there is less question about who is calling and leaving "dead air.'' Second, treating calls with excessive periods of "dead air" as abandoned would satisfy legitimate consumer concerns without unduly impinging on proper use of technology. With current technology, it is not feasible to ensure that "dead air" will last less than five seconds. Yet, marketers recognize that consumers do not like dead air and frequently hang-up while waiting for **a** sales representative, and are constantly improving AMD and predictive dialing technology to reduce this time.

The DMA believes that the Commission should specify that the maximum permissible lag time is five seconds from the end of the called party's greeting.[37] Any telephone solicitation call answered by a live person to which the marketer does not reply within that time should be deemed abandoned. Thus, calls involving excessive dead air would be counted in the numerator of the formula for determining an abandonment rate; the denominator should be all calls (including abandoned calls) answered by a live person. The Commission should then specify a reasonable limit – and not less than 3% within a 30-day period – as an acceptable cap on call abandonment.

Such a rule will raise additional questions about record-keeping requirements. Predictive dialers are not data storage units – they hold phone numbers to place calls. They can generate certain reports that include calls made, calls answered, and calls abandoned. **A** reasonable record retenlion period would allow the Commission or state authorities to investigate specific complains against marketers. We believe that a 12-month retention period would be reasonable. But, the Commission should not require

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[37] *Cf* Kan Stat **Ann** § 50-670(1)(b)(6)

marketers to report all data generated on a regular basis; to do so would inundate the Commission with meaningless data. The issue is, once again, allowing for enforcement of reasonable and rational standards designed to curb abuses without stifling use of perfectly legitimate technology in furtherance of legitimate and valuable business and consumer interests.

## D. THE COMMISSION DOES NOT NEED TO AMEND THE RULES GOVERNING PRE-RECORDED CALLS

The Commission's NPRM suggests that prerecorded calls should be limited to calls related to the purpose of an EBR on which they are based and that "dual purpose" calls should be regulated. Dual-purpose calls fit into two categories: Calls by nonprofits that utilize an affinity program and noncommercial calls that contain some commercial element. As discussed above, The DMA urges a single, broad definition of an EBR in all contexts. For dual-purpose calls, if the call is made by or on behalf of a nonprofit, it should bc exempt. For calls with a commercial and a noncommercial purpose to those with whom the commercial marketer does not have an EBR. then the call to an individual on the DNC list can be made only if the marketer has properly obtained the called party's prior express consent. There is no need for the Commission to clarify this rule

## E. IT IS NOT NECESSARY TO REDEFINE "RESIDENTIAL" CALLS TO INCLUDE CALLS TO WIRELESS PHONES

The Commission has raised a number of questions relating to the prohibitions on placing certain calls to wireless numbers, and has asked whether or not it should rework the definition of a "residential" call to include wireless numbers, to ensure that such numbers arc protected by the DNC provisions of the rules. We do not think that it is necessary to revise the definition. largely because the underlying goal of limiting calls to

wireless phones has been addressed. Specifically, The DMA recently announced that it has made arrangements to obtain (from Neustar, which administers the pool of numbers available as part of the North American Number Plan), and make available to telephone solicitors, wireless area codes and exchanges data. The service, which is **akin** to the TPS. will help marketers identify and suppress calls to wireless phone numbers.

## PART II – COMMENTS REGARDING A NATIONAL DO-NOT-CALL LIST

The DMA has traditionally opposed a governmentally imposed national do-not-call list. We still do not believe that a nationwide list is necessary, because the current FCC company-specific requirements – enhanced by The DMA's TPS – have been entirely effective in suppressing unwarranted telephone solicitations. Our experience confirms that self-regulation is still the best way to address issues in a broad and complex medium such as telephone marketing.

We recognize, however, that no-call lists are popular with state regulators and evidently have some appeal to both the FTC and this Commission. Perhaps this is because these lists may seem to be an easy way to enable consumers to reduce unwanted telephone solicitations and make enforcement simpler. In fact, they are more difficult and costly to develop and administer than most people probably assume. Similarly, we believe that enforcement is a more complex and nuanced issue than has been imagined. At the same time, marketers are facing unprecedented complexity in their efforts to honor a growing number of state DNC rules. Therefore, if the record in this proceeding leads the Commission to conclude that some form of national DNC list is justified, it must proceed with extreme care in the implementation of such a regime for policy, legal and,

above all, Constitutional reasons. We address the Constitutional issues in Section A, below.

Apart from Constitutional concerns, it may be possible to develop a nationwide DNC program that still allows for the success and growth of interstate commerce through telemarketing. We outline an affirmative proposal below. To do this, however, the Commission must – as a starting point – ensure that *any* nationwide DNC program achieves several core objectives. First, it is absolutely imperative that the Cornmission preempt state DNC requirements. Second, it is also critical that this Commission supersede any FTC requirement to subscribe to a national DNC list. Marketers absolutely must be able to go to one place to obtain one list and be assured that they will be in compliance nationwide. The proliferation of state lists – compounded now by the prospect of at least one and perhaps two national lists – is crippling to telemarketing. The patchwork of DNC obligations that regulators collectively are piling on telemarketing poses an unreasonable burden on interstate commerce and impermissibly restricts commercial speech. Third, the FCC must exempt calls *to* persons with whom the calling party has an established business relationship and calls by tax-exempt, non-profit entities.

If the Commission proceeds with a national DNC program, The DMA proposes a "Sum of the States" approach. We believe it will address these concerns, while also providing appropriate coverage for consumers. The Commission should also consider imposing different, less onerous requirements in special cases, such as local calls and for constitutionally-protected industries such as newspapers and magazines. We deal with these matters in Sections B and C, below. We further point out that, if the Commission decides to proceed with any form of a national DNC list, it will need to afford interested

parties the opportunity to comment on the specifics of such a proposal. a topic as to which the NPRM is entirely silent

## A. A NATIONAL DNC LIST REQUIREMENT OFFENDS THE FIRST AMENDMENT

The **DMA** addressed the First Amendment issues implicated by a nationwide DNC list in great detail in its comments before rhe Federal Trade Commission and they need not be repeated at length here. We attach relevant excerpts from those comments as **Exhibit 2**[38] and incorporated them herein by reference. The standards under *Central Hudson* are familiar, plainly applicable to this Commission's consideration of whether lo develop **a** national DNC list, and compel the conclusion that a national DNC list can not withstand First Amendment scrutiny

There are two fundamental problems with a governmentally imposed and controlled national list. First, if the only objective of such a list – and the only reason for its creation – is to reduce the absolute number of calls made to the American public. the governmental interest is itself unconsritutional. The government simply has no right **to** decide, directly or indirectly, how many telephone solicitation calls should be made in any given year or other period

Second, a government-imposed national DNC list is both over- and under-inclusive. The only arguably defensible justification for the creation of a national DNC list is that the American public or a substantial segment of it regards unsolicited commercial or quasi-commercial telephone calls as an invasion of the "privacy" of their homes. But the facts simply do not support this proposition. What the public wants – and what the existing rules permit it lo achieve – is the ability to pick and chose among

[38] *See* pp. 24-33

the companies, tax exempt organizations, and (for that matter) political parties from which they wish to receive information. Congress itself recognized that the privacy interest that the TCPA is intended to protect is not absolute and "must be balanced in a way that protects the privacy of individuals *and* pennits legitimate telemarketing practices."[39] The imposition of a national DNC list does not balance these equal interests in any respect. Such a list is over-inclusive because it broadly suppresses commercial speech while, at the same time, puts consumers to the choice of receiving all telemarketing calls or none. The government simply does not have a "substantial" interest in such an outcome.[40]

Furthermore, because of the structure of the TCPA, imposing a national DNC list is under inclusive and, therefore, cannot be said to "directly advance" the governmental interest asserted.'! The TCPA does not broadly govern uninvited telephone calls or even uninvited "commercial" calls. Rather, any national list created under the TCPA would only govern calls that fall within the definition of a "telephone solicitation." As the NPRM itself makes clear, that means that entire categories of callers and categories of types *of* calls would not be subject to the requirement. In some cases, the exemption – *e.g.*, for an established business relationship, not-for-profit organizations and political parties and, potentially, the press -- may themselves be constitutionally mandated. But

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39 TCPA. Pub. L. No. 102-243 § 2(9) (1991) (emphasis added)

40 *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 186-87 (1999) (questioning whether governmental Interest **was** substantial given inconsistent regulatory framework); *Central Hudson Gas & Electric Corp v. Public Service Comm'n*, **447** U.S. 557, 569 (1980); *U.S West, Inc v. FCC*, 182 F.3d 1224. 1235 (10th Cir. 1999) ("[P]rivacy may only constitute **a** substantial interest if the government specifically articulates and properly justifies It.").

41 *Central Hudson*, 447 U.S. at 564; *see also Elenfield v. Fane*, *507* U.S. 761, 771 (19931 (explaining that the government must show that "its restriction will in fact alleviate [the harm] to **a** material degree")

the fact remains that these excluded calls represent a substantial percentage of the calls that residential subscribers receive now and would continue to receive even under a national DNC list regime. Because the Commission cannot re-write the statute to define more broadly the "precise interest" advanced by the Congress for creation of the TCPA, the result is that a national DNC list will he under-inclusive and, therefore, will not directly or materially advance the governmental interest concerned.

The protection of the "privacy" of residential subscribers only from unwanted "telephone solicitations" is constitutionally infirm for another reason. By statutorily limiting the list to certain kinds of commercial calls, Congress has placed "too much importance on the distinction between commercial and non commercial speech"[42] and, in some cases, between speakers who are both engaged in commercial speech. In short, because a national DNC list is under-inclusive (and in some cases unavoidably under-inclusive for constitutional reasons) it will inevitably favor one type of speech over another in a fashion that the Constitution will not countenance.[43]

Because a government-mandated national DNC list arguably fails the first, and plainly fails the second and third prongs of *Central Hudson*, it necessarily fails the fourth prong as well. Because a national DNC list would he over-inclusive, it would not he "narrowly tailored" to serve a significant governmental interest; because it would be under-inclusive, it would not be "tailored" to "directly advance" such an interest.[44]

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42 *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993)

43 *See id* 415 (noting that the city of Cincinnati opted not to limit the number of newspaper racks containing tradttional newspapers because of First Amendment concerns).

44 *Greater New Orleans Broadcasting*, *527* U.S. ai 183-84 ("The four parts of the *Central Hudson* test are nor entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may inform a judgment concerning the other three.").

## B. CORE REQUIREMENTS OF A NATIONAL DNC PROGRAM

### 1. Preemption of State Requirements

Under the TCPA, state DNC requirements must yield to a national DNC database. Although the TCPA directed the Commission to consider different methods to enable consumers to avoid receiving unwanted telephone solicitations,[45] Congress specifically authorized the Commission to "require the establishment and operation of a *single national database*" of DNC requests.[46] Thus, Congress intended the Commission to preempt state regulation if the Commission opted to employ a nationwide database. Moreover, subsection(e)(2) of the TCPA provides that if the Commission decides to establish a national list, then:

> a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such state."[47]

.Accordingly, states seeking to enforce DNC obligations must do so based on "their segment" of a national list.[48] The TCPA further provides that a limited set of more

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45 47 U.S.C. § 227(c). As discussed more fully above, the Commission may also preempt conflicting DNC requirements under secrion 1 of the Communications Act, which gives the FCC plenary jurisdiction over interstate communications. 47 U.S C. § 151

46 *Id.* § 227(c)(3)(emphasis added).

47 *Id.* § 227(e)(2).

48 *See also id.* § 227(c)(3)(J) (daiabase must he designed to enable states to use it to enforce state law). An earlier bill passed by the House of Represenratives, H.R.1304, included somewhat different language about the interplay between state and federal requirements than the final version that became the TCPA. Ultimately, however, the difference had little substantive effect. Section (f) of H.R. 1304 provided that if rhe FCC were to establish a national DNC database:

> (2) . . . a State or local authority may not develop any different database or system for use in the regulation of telephone solicitations and may not enforce restrictions on telephone solicitations in any nianner that is nor based upon the requirements imposed by the Cornmission.
>
> (3) Srare Enforcement Permitted.- Nothing in this secrion or in the regulations prescribed under this secrion shall prohibit the segmentation of the database or functionally equivalent method or procedure for use by State or local authorities, nor preempr any State or local authority from creating mechanisms to enforce compliance with the database or functionally equivalent system. or a segment rhereof.

restrictive intrastate requirements are not preempted, but this "savings" clause is made "subject to." and is. therefore, extinguished by, the preemptive force of subsection(e)(2) as it relates to a national DNC.[49]

Congress, therefore, expected and intended the Commission to preempt other requirements to ensure that marketers would only have to obtain one list. The language – and legislative history – of the TCPA leave no doubt that Congress was mindful of the burdens that the TCPA would place on industry, and did not want them to be excessive.[50] Certainly Congress did not envision that marketers would be subject to duplicative or conflicting DNC obligations.

### 2. Superseding an FTC Do-Not-Cali Program

The Commission also must, if it wishes to impose a national DNC standard, supersede any FTC do-not-call list. Above all, the FTC has no legal authority lo adopt a national DNC list or require anyone to subscribe to it. The DMA briefed this issue extensively in its comments before the FTC; we have attached an excerpt of those

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In comparison, by providing that **a** state may not "requtre the use of any database, list, or listing system that does not include the pan of such single national database that relates to such state." the TCPA merely simplified and melded subsections (f)(2) and (f)(3) of H.R. 1304 into a more streamlined and coherent provision. Yet, in substance, the TCPA still preempts state efforts to impose different requirements, and still permits states to enforce the federal standards.

49 *Id.* § 227(e)(1).

50 *See. e.g.*, H.R. Rep. No. 102-317 (1991).9 CIS H. 36323 ("The Committee further believes that because state **laws** will be preempted, the Federal statute must be sufficiently comprehensive and detailed [to] ensure States (sic) interests are advanced and protected."); 137 Cong. Rec. S16,204 (daily ed. Nov. 7, 1991) (statement of Sen. Gore) ("While the States remain free to adopt **laws** affecting intrastate communications. I ani sure the Senaror would join me in encouraging the States to adopt **laws** consistent with the Federal system to facilitate the telemarketers' ability to comply fully with both the State and Federal laws regarding intrastate communications."); 137 Cong. Rec. HI1,311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo) ("To ensure a uniform approach to this nationwide problem, this bill would preempr the States from adopting a database approach, if the FCC mandates a national database. From the industry's perspective, this preemption has the important benefit of ensuring that telemarketers are not subject to duplicative regulation.")

comments in **Exhibit 2**[51] and incorporate them herein by reference. In summary, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")? gives the FTC jurisdiction to promulgate regulations to proscribe "deceptive telemarketing" and "other abusive telemarketing" conduct. Neither of these mandates encompasses the formation of a national DNC list.

Similarly, this Commission may not simply mandate that entities subject to its jurisdiction comply with the FTC's rule. This Commission has no power to delegate to other federal agencies its duties or powers under the TCPA and can not make compliance with the TCPA dependent on its assessment that a company has adhered to other agencies' standards.[53] Even if the FTC had authority to create a DNC, it remains powerless to enforce its requirements against entities such as common carriers, banks, and others. Although it is theoretically possible for the FTC and this Commission to divide enforcement while retaining one DNC list and set of implementing regulations, in practice that approach would result in staggering disparity in the potential liability that various entities would face in the event of non-compliance. The FTC and FCC have very different enforcement tools at their disposal, and may seek and impose different sanctions. Different industry segments must not face different consequences for violating essentially the same federal standard. To the contrary, the TCPA permitted only the establishment of a "*single* national database" and then only if the FCC deemed it

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51 ***See*** pp. 15-21

52 15 U.S.C. § 6101 *et seq*

53 *See, e.g.*, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rulemaking, MM Docket No 98-204, ¶ 130, (Released Nov. 20. 2002)("We can not merely assume that a broadly defined class of stations is necessarily subject in each instance to an effective alternative to our requirements, and, even if we could, reliance on such alternate programs would put us in the

necessary. Congress neither contemplated nor authorized two federal lists. Congress only authorized this Commission to adopt a national database, and it gave the Commission preemptive authority to do so.[54]

### 3. State Jurisdictional Issues

The Commission requested comment regarding states' jurisdiction over out-of-state telemarketers.[55] Contrary to the assertions of state law enforcement officials,[56] states do not have jurisdiction to apply state laws covering telephone solicitations to interstate telephone calls. This conclusion reinforces the fact that, if it implements a national DNC database, the FCC must pre-empt state efforts to apply their state DNC rules to interstate and intrastate marketers.

Leaving aside the broad question of whether or not the states have jurisdiction over out-of-state marketers under the Due Process and Commerce Clauses of the Constitution, Congress has declined to grant the states such jurisdiction as they might otherwise have to impose state law requirements on telephone solicitation calls that originate in one state and terminate in another. It did so by enacting both the TCPA and

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untenable posirion of having to resolve whether a broadcaster had violated requirements of other agencies in order to dcternune whether it was in compliance with our rules.").

[54] Apan from the FTC's fundamental lack of power to impose a national DNC, an FTC database will not address many other issues that must he considered and resolved. Preemption of state lists is one, but there are others. For Instance. as the Commission noted in the NPRM, it is bound to ensure that its database meets certain minimum critrria that the FTC is not, such as ensuring that carriers provide cenaiii notices about consumers' right to be on the list (an obligation that the FTC has no jurisdiction to impose), as well as giving states appropriate access so that they may enforce compliance with the list. The FTC has nor yet released its final rules. so it is difficult to offer complete comments on how the final rule might conflict with (or complement) an FCC database The FTC might or might not speak to these concerns. and its final rules may raise more questions. At a minimum. if the FTC issues its final rules before this Commission acts on its own proposal, we urge this Commission to permit interested parties to submit additional comments regarding the impact of those rules on this proceeding.

[55] *NPRM* at ¶ 63

the Telemarketing Act. The latter confers upon the FTC primary jurisdiction over interstate calls subject to the federal law and only empowers the states *to* enforce the federal standards adopted by the FTC with respect to such calls.

The TCPA makes even clearer that states **lack** power to apply their telephone marketing laws extra-territorially. **A** central reason for the enactment of the TCPA is that Congress concluded that the states do not and should not have jurisdiction over interstate communications.[57] The TCPA leaves unchanged the language of Section 2(a) of the Communications Act, which grants the FCC exclusive jurisdiction of "all interstate and foreign communication."[58] It expressly provides that – in the absence of a national list -- the states may only impose a limited group of "more restrictive *intrastate* requirements" on telephone solicitation.[59] In short, the states can not now enforce their statutes except as to marketers over whom they have *in personam* jurisdiction and then only with respect to calls that originate and terminate within the same state.[60] If the FCC adopts a national DNC list. a state may enforce this Commission's requirements as to all calls terminating in that stare, but its jurisdiction to do so would arise under federal law, and federal substantive standards and any independent authority *to* establish "more restrictive" intrastate standards would expire by operation of section (e)(1) of the TCPA.

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[56] *Id.*; Comments **and** Recommendations of the Attorneys General, filed in rhe FTC proceeding *(Telemarketing Sales Rule. Notice of Proposed Rulemaking*, Federal Trade Commission. 67 **Fed.** Reg. 4492 (January 30. 2002)). ar 10.

[57] **Sei,** *s u p* note 33.

[58] 47 U.S.C § 152(a).

[59] *Id* § 227(e)(1)

[60] *C.f. Quill Corp. v North Dakota.* 504 U.S. 298 (1992).

### 4. Exemptions for Non-Profit and Established Business Relationship Calls

If the Commission prohibits making telephone solicitations to persons identified on a national DNC list, it *must* as **a** matter of law exempt calls by tax-exempt non-profit organizations, as well as calls to "any person with whom the caller has an established business relationship." Pursuant to the TCPA, such calls are by definition exempt from the term "telephone solicitation" and. thus, must also be exempt from any DNC requirements. As discussed below, The DMA believes that, under the TCPA, the Commission may and should consider adopting other limited exceptions. The EBR and non-profit exemptions, however, are expressly mandated by law and essential to The DMA's proposal, as well as any other realistic proposal for a nationwide program. In addition, we note that some, but not all, states' laws include non-profit or EBR exemptions and some of the exemptions are limited based on the duration of the relationship or other factors. Thus, we reiterate that the FCC must preempt state DNC rules, including those that do not include the TCPA exemption for non-profit and EBR calls as this agency defines those terms.

A consumer's request to be placed on a national DNC list should not terminate an EBR, nor should it preclude companies from forming new business relationships (except through telephone solicitations). A consumer should, however, be permitted to terminate an EBR exemption (for purposes of future telephone solicitations) by asking to be included on a company's DNC list. These requirements must apply to all calls covered by the TCPA.

## C. A PROPOSAL FOR A "SUM OF THE STATES" DNC PROGRAM

### 1. The Basic Framework

If the Commission establishes a national DNC database, The DMA proposes that it be comprised of individuals whose names are included in the databases of the 27 states that have implemented their own statewide DNC laws. To complement this database, however, consumers residing in states that have not enacted their own DNC laws would be able to submit a DNC request to The DMA's TPS, at no cost to the consumer, which would become part of the DNC. In addition, companies engaged in telephone solicitation should still be required to maintain company-specific lists;[61] among other things, this would ensure that consumers – including existing customers – are able to indicate that they do not want to receive calls from a particular organization without having to limit calls from all commercial firms.

Subject to certain standard criteria and conforming requirements to ensure uniformity for the national database. new DNC requests (*i.e.*, names, numbers, and addresses) could be added to the national databasc via the states, pursuant to procedures

[61] As discussed above. however. rhe Commission should reduce the retenlion period for company specific lists from 10 years to five years

that they have established. Updates to the national list could be made available to marketers or their agents as the states create them; each state would forward to the list administrator, in advance of the date on which the national list is to be updated, identifying information for each residential telephone subscriber in its state who wants to be added to the national list. Following release of the updated data, marketers would then update their own marketing data and remove individuals who are in the DNC database from their calling lists. The DMA proposes that names be maintained in the database for a period of 5 years. Any national list should also be available to all types of entities, as long as they certify that they will only use it to comply with the DNC requirements. For instance, companies that provide marketing prospects to direct sellers have interest in first "scrubbing" their prospect data against states' DNC lists to assist their seller-clients in honoring state-level DNC requests. Some states, however, limit access to their list to a narrowly defined group of "telemarketers" or "telephone solicitors." The Commission should preempt such limits and avoid them in establishing a national list.[62]

The database should be verified the Postal Service's NCOA data. which the DMA currently uses for the TPS. to match name. number, and address. Given the rate at which numbers turn over, it is essential that the database be refreshed often and with more than just a telephone number Moreover, it is not enough to rely on automatic number identification **("ANI")** or bulk DNC submissions; they are subject to abuse and manipulation and are not sufficiently reliable to serve as a sole source of data for a valid DNC request

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[62] *See e.g.*, Ky. Rev. Stat Ann. §§ 367.46951-46999 (Michie, 2002) (access limited lo "merchants" or "telemarketers," "telemarketing companies" required to register with the Attorney General); Tenn. Comp. R. & Regs. Ch. 1220-4-1 1.01 (2001) (access limited to "telephone solicitors" who register with the Tennessee Regulatory Authority): Tex. Bus. & Corn. Code Ann. §§ 43.002, 43.101 (West 2002) (access limited to "telemarketers").

The Commission should outsource administration of the Sum of the States (or any other) DNC database. In fact, the TCPA ***requires*** the Commission to select an outside entity to run it. by providing that the Commission's regulations "shall . . . specify a method by which the Commission will select an entity to administer such database."@ The legislative history is equally clear. The House Report accompanying H.R. 1304, a predecessor to what became the TCPA, states that by adopting this language (which was retained through enactment of the TCPA), "the Committee intends that the Commission contract out, or enter into other arrangements, for the development and administration of the national database, rather than administer it in-house."[64] As discussed below, The DMA is willing to explore the possibility of serving as the list administrator.

The Sum of the States concept satisfies the requirements of the TCPA. **As** noted, the list can he and should he made widely available to promote compliance, yet the Commission can readily prohibit use of the list for any purposes other than furthering compliance with its DNC regulations. It would also satisfy the requirements of subsection (e)(2) of the TCPA. which provides that a state may not use any DNC database that does not include the part of a national database that relates to that state.[65] Because the Sum of the States database would be comprised of state lists, each stale list would, by definition, include its segment of the national list.

The Sum ***of*** the States framework would he a less costly method of developing a national list than starting anew, since a sizable percentage, and maybe even most of the names that will eventually be included in it already are included in either a state list or the

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63 *37* U.S.C. § 227(c)(3)(A).

64 H.R. Rep. No. 102-317 (1991). 9 CIS H. 36323

65 47 U.S *C.* § 227(e)(2)

TPS. It would enable telephone solicitors or their agents to obtain a list covering each state – and comply with state and federal legal requirements – from a single source and in a uniforni format, which would help foster compliance. Enforcement would also be less burdensome for the Commission and for the states than it would be with other approaches. We anticipate that the states that do have DNC laws would be required to submit their lists to the national database and would, in turn, assume primary responsibility for enforcing the DNC requirements as to any prohibited calls to their citizens. Thus, the Sum of the States approach also allows for more effective state enforcement, since individual states would already possess their own segment of the national list. and would be authorized to enforce compliance of the federal standard for interstate calls without concern that they lack jurisdiction over interstate calls and out-of-state telephone solicitors.

2. Additional Proceedings and Public Comment

If the Commission adopts the Sum of the States framework (or for that matter if it decides to adopt a different type of nationwide DNC program), it would need to formulate a detailed proposal and issue it for further public comment, to refine and finalize an operational plan. The Commission would need to consider. for example, establishing acceptable formats for submitting names and other identification/verification data, privacy protections for the data. ensuring that the list administrator is reimbursed to cover its costs, as well as ensuring that states recoup their costs in supplementing the database with new names. The Commission would also need to consider means to help ensure access by person with disabilities.

In such proceedings, the Commission should also consider imposing alternative do-not-call requirements for certain industries or practices as permitted by the TCPA.

First, certain newspapers and magazines, which are the present-day equivalent of second-class mail permit holders, are statutorily entitled to special consideration. These entities do maintain company-specific DNC lists and should be required to continue to do so. However, the TCPA specifically allows the Commission to consider, among other things, whether different procedures or methods should apply to "small businesses or holders of second class mail permits."[66] In the years since Congress enacted the TCPA, the U.S. Postal Service has abandoned the "second class mail" terminology, but it has retained the classification, which it now calls Periodicals. Because Periodicals enjoy favorable postage rates,[67] the standards to qualify for a Peridocals mailing permit are stringent;[68] not all "magazines" qualify and the Postal Service possesses and exercises the power to deny or revoke permits in appropriate cases.

These mailing permits exist because Congress recognized the core First Amendment value of a free and unfettered press. Congress empowered the FCC to impose less onerous do-not-call obligations for parallel reasons. Congess realized how closely the commercial activities of newspapers and magazines, including telephone solicitation, are tied to the freedom to express non-commercial news and opinion. Newspapers and magazines are necessarily dependent on commercial activity to support their non-commercial mission. And as a society we have reserved a special place for these publications given their importance in preserving one of this nation's most cherished founding principles and fundamental rights. Thus, The **DMA** believes that it is

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66 47 U S.C. § 227(c)(1)(C).

67 39 U.S. §3622(b)(8)

68 They include. for instance, limitations on the amount of advertising that may be contained in an eligible publication *Domestic Mail Classification Schedule* § 411 *et seq.*

appropriate for the Commission to consider exempting entities that hold Periodicals mailing pennits from the obligation to subscribe to any national DNC database.

The TCPA also requires that the Commission consider alternatives to a national do-not-call list for "local telephone solicitations."[69] The legislative history of this provision makes clear that the Commission is to consider less burdensome standards on certain local calls, even if made by large companies with branch offices." While it is clear that Congress did not intend to empower the Commission to exempt completely all "local" calls, there is sound reason for the Commission to establish requirements that are less onerous than a national list for certain types of local marketers: Calls made by locally-based businesses in which the sale of goods or services is not completed and payment or authorization of payment is not required until after a face-to-face presentation or transaction.

While such calls may technically fall within the definition of a "telephone solicitation," to which a national DNC list would otherwise apply, these calls differ from other solicitations because they meet two unique conditions. First, the purpose of such calls is not directly to sell goods or services over the phone, but merely to make arrangements for a face-to-face meeting, either at the consumer's home or at the caller's office, at which time thc transaction **will** be more fully explained and consummated. Consumers are, of course, free to decline the opportunity for an appointment. Second.

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69 47 U.S C. § 227(c)(1)(C)

70 *See. e.g.*, 137 Cong Rec.. S16204 (daily ed. Nov. 7. 1991) (colloquy between Senators Gore and Presslcr). Senator Gore asked whether an identical provision in an earlier version of the TCPA would "apply **to** companies that conduct business locally...regardless of the specific type of business they conduct" He used **a** national photographer with local offices as an example, and Senator Pressler confirmed that such **a** company would be covered by this provision.

the consumers are not dealing with an unknown merchant or an unknown entity."[71] In fact. the colloquy between Senators Gore and Pressler in the TCPA's legislative history. which discusses the example of a national photographer with local offices, exactly fits both of these conditions. In that case, calls were made by the local branch office, hence local in character, and the transaction was not consummated until the consumer came to the studio. The identical considerations support an exemption from national DNC requirements for all businesses that are making local calls in which the transaction is not completed until after a face-to-face presentation.

Finally, the Commission must address the process of selecting an administrator for a national database either in a separate proceeding, or separate phase of this proceeding. The DMA is willing in principle to serve as administrator, given our extensive and successful experience with the TPS. As we noted above, The DMA has operated the TPS since 1985, consumers find it easy to use, and over SO-percent of TPS subscribers that we recently surveyed reported that it has reduced the number of unwanted solicitations that they receive. In addition, five states' DNC laws currently require marketers to obtain the TPS."[72] In short, The DMA is uniquely qualified to serve as administrator and is willing to work with the Commission to examine that possibility.

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[71] *Id*. (noting that local businesses "become part of the community, and are subject to the scrutiny of the community, and must live by their reputation in the community"); see **also** 137 Cong. Rec. H11313 (Nov. 26, 1991)(statement of Rep. Cooper) ("[T]elemarketers making local calls already have an accountability **within** the community by virtue of their reputation as businesses and as individuals ").

[72] There five are: Connecticut. Conn. Gen. Slat. § 42.288a (2001); Maine, Me Ret. Star. Ann. Tic. 32 § 14716 (2002): Pennsylvania. 2002 Pa. Laws 24 (2002) (amending P.L.911, No.147); Vermont, Vt. Stat. Ann. 9 § 2464a(b)(2) (2002); and Wyoming, Wyo. Stat. Ann. § 40-12-301(a)(viii) (2001).

## CONCLUSION

The TCPA and the Commission's current regulations achieve a delicate balance. They empower consumers to make meaningful choices, and give them the tools to ensure those choices are honored. They also vest regulators – federal and state – with authority to prevent abuses in the use of telemarketing. And, notwithstanding the burdens involved, they are flexible enough to allow for continued growth of telemarketing.

The Commission quite rightly notes that the marketplace has changed in the years since it first adopted its rules implementing the TCPA. Yet, we submit that nothing has changed so much that it warrants dramatic changes in the curent regulatory regime. Experience has shown that the retention period for DNC requests is too long; it should be reduced to 5 years. And consumer mobility and number chum – which are on the rise with no signs of abating – make it important to allow companies to use NCOA to verify the continued accuracy of a DNC request. Consumers' use of wireless technology has expanded considerably, but The DMA has just announced a new program to make available data that will enable marketers to suppress wireless telephone numbers from their marketing databases. Thus, even this change in the market does not warrant a change to the existing regulations.

The Commission should step-up enforcement of the current DNC requirements, and its efforts to educate consumers about their right to ask a company not to call in the future. The DMA stands ready to explore ways in which it might partner with the Commission to enhance consumer outreach to achieve that goal. **A** national DNC list, however, simply is not necessary. Company-specific lists work. The TPS works. Indeed, the TPS is in niany respects a "national" list that already exists and, moreover, one that

companies and non-profit organizations agree to honor voluntarily. A government-mandated DNC list would not he an improvement over the current regime

Nonetheless, if the Commission proceeds with a national list, it must ensure that it establishes a truly *national* list: There must be a single database, with uniform exemptions for non-profit and established business relationship calls as mandated by the TCPA, that applies to calls throughout the country. States may he authorized to help protect their citizens from receiving unwanted telephone solicitations, but their individual and disparate requirements must yield to federal preeminence. The DMA's Sum of the States proposal would achieve these goals, and provide clear and predictable standards for both marketers and consumers. Short of leaving well enough alone, a Sum of the States approach is the best way to try to maintain the careful balance the Commission achieved 10 years ago.

Respectfully submitted,

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